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KAYAK SOFTWARE CORPORATION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

EVOX PRODUCTIONS LLC,
a Delaware limited liability company,

Plaintiff,

vs.

KAYAK SOFTWARE CORPORATION,
a Delaware corporation; and DOES 1-10,

Defendants.

Case No. CV15-05053-PSG-AGR

**KAYAK SOFTWARE
CORPORATION'S NOTICE OF
MOTION AND MOTION TO
EXCLUDE TESTIMONY OF
JEFFREY SEDLIK**

Date: January 23, 2017
Time: 2:30 p.m.
Place: Courtroom 6A

KAYAK SOFTWARE CORPORATION,
a Delaware corporation,

Counter-Claimant,

vs.

EVOX PRODUCTIONS LLC,
a Delaware limited liability company,

Counter-Defendant.)

KAYAK'S MTN TO EXCLUDE SEDLIK TESTIMONY
Case No. CV15-05053-PSG-AGR

1 TO THE HONORABLE COURT, ALL PARTIES, AND ALL ATTORNEYS OF
2 RECORD:

3 PLEASE TAKE NOTICE that at 2:30 pm on January 23, 2017, in Courtroom 6A
4 of the above-entitled Court, located at 350 W. 1st Street, Los Angeles, California 90012,
5 Kayak Software Corporation (“Kayak”) will, and hereby does, move the Court *in limine*
6 for an order excluding the testimony of Jeffrey Sedlik.

7 Mr. Sedlik’s testimony exceeds the scope of his claimed expertise and much of his
8 report is irrelevant. Much of it is also not proper rebuttal. Mr. Sedlik’s testimony,
9 therefore, be excluded.

10 This motion is made following the conference of counsel pursuant to L.R. 7-3
11 which took place on December 9, 2016.

12
13 DATED: December 16, 2016

FOLEY & LARDNER LLP

14
15 By: /s/ Jonathan E. Moskin

16 Jonathan E. Moskin
17 Jean-Paul Ciardullo

18 Attorneys for Defendant/Counterclaimant
19 KAYAK, INC.
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1 **I. INTRODUCTION**

2 The basis of this litigation is a license agreement under which KAYAK obtained
3 from Evox generic stock photos of automobiles (equally available from several other
4 stock photo houses) to use as thumbnails accompanying search results on its car rental
5 search business that is part of its popular travel service. Despite the small cost of the
6 license totaling roughly \$11,000 for an entire year (including all of the disputed uses on
7 KAYAK's mobile app), Evox now seeks a windfall of \$100 million in damages based on
8 a theory that KAYAK's use of the photos on its mobile app exceeded the scope of the
9 license and thus constituted copyright infringement.

10 Evox has submitted a report of a claimed expert in stock photography, Jeffrey
11 Sedlik, to rebut the report of KAYAK's expert, Gary Elsner. Mr. Sedlik's report has two
12 broad sections, one concerning contractual terms of the license agreement and the other
13 concerning the copyrightability of the subject photographs. As shown below,
14 Mr. Sedlik's report should be excluded because he is not a lawyer competent to opine on
15 the terms of the parties' Agreement and has no personal knowledge what the parties
16 intended. Indeed, without even attempting to consider the Agreement in any coherent
17 manner or in context, he argues both that the principal disputed term, "portal," has no
18 meaning in the contract, yet also offers some evidence purporting to show that the term
19 does have some accepted meaning in the industry (albeit not for licensing). This
20 evidence is also contrary to the testimony of Evox's own designated witness on contract
21 issues that the term was simply created and used subjectively by Evox. At any rate,
22 Mr. Sedlik's report is accompanied by no evidence that the term is actually used for
23 licensing in the industry – such as sample agreements from other entities – and he
24 nowhere says that it is. His report is inadmissible to challenge the sworn testimony of
25 Evox's own witnesses and is not of any probative value in challenging the report of
26 Mr. Elsner that the term in fact is not used in the industry. His other analysis of contract
27 terms is equally irrelevant and he is not competent to try to divine the subjective mental
28

1 state of KAYAK's own employees who negotiated the Agreement, notwithstanding his
2 insistence he knows better than they do what they themselves understood.

3 Regarding copyrightability of the subject photographs, Mr. Sedlik's report is
4 inadmissible because he makes no effort to analyze the content of any of the photographs
5 actually in issue, none of which are even mentioned. To the contrary, his entire analysis
6 was simply copied verbatim from a report Mr. Sedlik prepared several months earlier for
7 another case for Evox involving entirely different photographs. He admitted at his
8 deposition he does not even remember what photographs were at issue in that case.
9 Moreover, his report only describes broad processes for photographing automobiles,
10 referring to no actual expression in any of the Evox photographs at issue, yet as Evox
11 itself admits, it is only expression in the photographs that could possibly be
12 copyrightable, not the processes used to create the images.

13 **II. ARGUMENT**

14 **A. Daubert Standards**

15 A party seeking to introduce expert testimony generally has the burden of
16 demonstrating that the expert is qualified, based on the witness' "knowledge, skill,
17 experience, training, or education," and that (1) the testimony is "based upon sufficient
18 facts or data," (2) the testimony is "the product of reliable principles and methods," and
19 (3) "the witness has applied the principles and methods reliably to the facts of the case."
20 Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n.
21 10 (1993). The court acts as a "gatekeeper" to ensure that expert testimony satisfies the
22 admissibility requirements of Rule 702 and is "not only relevant, but reliable." *Kumho*
23 *Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert*, 509 U.S. at 589).

24 In addition to the requirements of Rule 702, a court must independently weigh the
25 probative value of the testimony against unfair prejudice, confusion of the issues,
26 misleading the jury, and/or waste of time. Fed. R. Evid. 403. While methodological
27 deficiencies often go to the weight rather than the admissibility of a consumer survey, if
28 the flaws are sufficiently serious, "Rule 403 permits the exclusion of relevant evidence 'if

its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....” *Daubert*, 509 U.S. at 595.

B. Mr. Sedlik’s Contract Analysis Is Irrelevant and Misleading

Mr. Sedlik is not a lawyer and has identified no qualifications that would permit him to opine on the meaning of the parties’ Agreement. Indeed, he admits in his report (p. 14) (Ex. 1 to Moskin Dec.): “I am not an attorney and do not provide a legal interpretation of the Agreement terms.” Lacking such qualifications, he cannot testify on issues of contract interpretation. *White v. Ford Motor Co.*, 312 F.3d 998, 1008-09 (9th Cir. 2002) (“A layman, which is what an expert witness is when testifying outside his area of expertise, ought not to be anointed with ersatz authority as a court-approved expert witness for what is essentially a lay opinion.”); *Apple, Inc. v. Samsung Elecs. Co.*, 2013 U.S. Dist. LEXIS 160188, *42 (N.D. Cal. Nov. 6, 2013) (“Under Federal Rule of Evidence 702, experts may not make expert conclusions about areas outside their expertise.”); *Stop Staring! Designs v. Tatyana, LLC*, 2012 U.S. Dist. LEXIS 192949, *2 (C.D. Cal. Feb. 21, 2012) (vacating jury verdict and granting new trial where expert had been allowed to testify outside his expertise). Although an expert in stock photo licensing could potentially testify to how certain terms are actually used in actual licensing agreements in the field, Mr. Sedlik offers no such analysis in his report.

Despite his admitted lack of qualifications (or perhaps because of that lack), Mr. Sedlik plainly misreads even the literal language of many contract terms and gratuitously faults KAYAK based on his misunderstanding of KAYAK’s legal position.

Mr. Sedlik lists many terms of the Agreement that he says (p. 18) demonstrate that KAYAK “repeatedly acknowledged that the [subject] Photographs are copyrightable, protected by copyright and owned and licensed by Evox.” In fact, the Agreement is conspicuously silent about any such acknowledgement by KAYAK. Missing from the Agreement¹ are any words or provisions (which are common to intellectual property

¹The Agreement was designated “Confidential” by Evox and was filed under seal as ECF No. 60-4 (ex parte), Ex. 1) to Kayak’s pending motion for summary judgment.

licenses, as Mr. Sedlik acknowledged he has seen (Ex. 4 to Moskin Decl. Sedlik Tr. 106 l. 2-9)), expressly stating that KAYAK acknowledges that Evox's claimed rights in its intellectual property are valid much less any undertaking by the licensee not to challenge the validity of the claimed rights. Instead, KAYAK merely agrees not to claim title to the "Licensed Materials." (Appendix ¶ 9.) It has no interest in doing so.

To reach his conclusions, which are not supported by any legal analysis or citation of any rules of contract construction, Mr. Sedlik first badly misconstrues the language of the "recitals" in the Agreement. In fact, Evox's form contract recites only that "Whereas Evox creates and owns *libraries* of images ..." and KAYAK merely acknowledges that "Licensee wishes to license certain content from Evox..." There is no mention of copyright, yet Mr. Sedlik's report says (p. 18) that in the recitals, Kayak somehow "acknowledged that Evox is the copyright owner and licensor in the Photographs." Likewise, the actual language of the license grant (¶ 4) refers only to "products," namely the "AIL" or "Automotive Image Library" that was the subject of the Agreement. There is no mention of copyright and no acknowledgement by KAYAK that it acquiesced in any such (non-existent) claim of copyright ownership. Mr. Sedlik mistakenly goes on to cite KAYAK's undertaking to include with the photos Evox's standard form copyright notice (p. 19), ignoring that the parties expressly agreed that no such notice was required by KAYAK. Instead, the Agreement (¶ 10.1) provided for so-called page attribution, under which KAYAK needed only to state on the bottom of each page of its website displaying Evox photos that "Vehicle images are licensed from Evox."² (Even if KAYAK had agreed to provide a notice to third parties that Evox claimed copyright in the images, that would be very different from itself admitting the validity of the copyrights.) Mr. Sedlik's argumentative and mistaken rewriting of the Agreement can only confuse jurors and should not be allowed.

²Had the parties not agreed to use "page attribution," the form copyright notice would have included a statement about what Evox claimed to be its copyright (Appendix ¶ 6), and would have done so only as a notice to third parties. It included no admission or acknowledgement by KAYAK that the claimed rights are valid or enforceable.

1 Although it makes no difference to KAYAK whether the images are protected by
 2 copyright (because they merely serve an incidental background function of illustrating
 3 cars alongside KAYAK's actual service of providing information to users about rental
 4 rates and locations so they can make bookings), Mr. Sedlik insisted he knew better than
 5 KAYAK itself that it needed and wanted only copyrighted images. For no apparent
 6 reason, he refused to credit the possibility that KAYAK just wanted convenient access to
 7 a reasonably large library of consistent images (with the cars facing in one direction), as
 8 actually testified to by the employees who negotiated the deal, insisting instead by some a
 9 priori assumptions that the contract terms had to be interpreted to mean KAYAK
 10 conceded the validity of the copyrights. By the same reasoning, he also insisted that
 11 everyone who goes to public libraries wants to know if the books are copyright-protected.
 12 (Sedlik Tr. 131:7-140:17.) Untethered from fact or logic and unsupported by any rules of
 13 contract interpretation, such testimony by a non-lawyer can only mislead the jury.

14 Again unsupported by any legal analysis or citation of any rules of contract
 15 construction, Mr. Sedlik purports to construe the term "portal website," which is used in
 16 the Agreement drafted by Evox to define the scope of use to mean simply a website.
 17 (P. 16.)³ Mr. Sedlik agreed in his deposition that his "definition" of "portal" deprives the
 18 word of any meaning, such that the scope of use of "portal website" should be read to
 19 mean only "website website." (Sedlik Tr. 98:22-102:24) Notwithstanding his contention
 20 that "portal" has no meaning, he nonetheless immediately contradicts himself by offering
 21 in his report (p. 21) a definition that does ascribe meaning to "portal" (as "a website
 22 considered as an entry point to other websites or online content"). Laying aside that
 23 KAYAK considers its website to be a portal or entry point to its full range of travel
 24 services, including its completely integrated mobile app, and laying aside that Mr. Sedlik
 25

26
 27 ³Paragraph 6 of the Agreement defines the scope of use as a "research application
 28 on a single Portal Website." It is KAYAK's position that a "portal" must be a portal or
 opening to something, in this case to KAYAK's actual business, all of which is fully
 integrated with its website. Otherwise, Evox could have simply said "website" and
 included express exclusions of KAYAK's mobile app, which it did not do.

1 never addresses this interpretation of the term “portal,” his definition is taken from his
2 own dictionary for the stock photo industry, but nothing in the dictionary definition says
3 the term has any accepted meaning in licensing, much less in defining the scope of a
4 license. Not surprisingly, Mr. Sedlik identifies in his report not a single example of any
5 such license in which the term is used, much less any supporting his and Evox’s view.
6 (As shown below, although Mr. Sedlik’s report is offered as a rebuttal to KAYAK’s
7 expert on stock photography, Gary Elsner, who opines that the term “portal” is not a
8 standard term in licensing stock photos, Mr. Sedlik’s inability to offer any contrary
9 evidence supports KAYAK’s contention.)

10 In offering his definition for “portal,” Mr. Sedlik also does not address or attempt
11 to reconcile his views with the actual sworn testimony of Evox’s designated witness on
12 the subject of contract interpretation, Barry Thompson, or Evox’s founder, David
13 Falstrup, admitting that Evox itself does not know how Evox came to use this term in its
14 contracts. (SUF⁴ 30-31.) Contrary to Mr. Sedlik’s interpretation, Evox itself thus agreed
15 that “portal” is not used by it as an industry standard term. To the contrary, it uses the
16 term primarily to distinguish subscription-type licenses from so-called Dealer Value
17 Added Reseller (“DVAR”) licenses. (SUF 32.) Mr. Sedlik instead indicates he knows
18 better than Evox’s own 30(b)(6) designated witness what the contract term means.
19 (Sedlik Tr. 147: 5-149:8.) In offering these plainly inconsistent statements, Mr. Sedlik
20 cites no guiding principles of contract interpretation.

21 As noted, Mr. Sedlik does not cite in his report a single other industry contract in
22 which the term “portal” or “portal website” appears. Nor does he cite a single example in
23 which the term is used in any manner remotely similar to that here where any company
24 such as KAYAK has a website that is thoroughly integrated with its mobile app. That
25 Mr. Sedlik’s dictionary definition does not expressly mention mobile apps is not
26 surprising because it was first crafted (evidently with the assistance of KAYAK’s expert,
27

28 ⁴Reference is to KAYAK’s Statement of Undisputed Fact accompanying its motion
for summary judgment. (ECF No. 60-2 (ex parte).)

1 Mr. Elsner) and has not been updated since 2006 (Sedlik Tr. 206:5-9), but the first mobile
2 apps did not appear until 2008, after the launch of the iPhone.

3 Mr. Sedlik also made no effort to analyze numerous Evox agreements in which it
4 routinely uses the identical definition of “portal” in contracts it uses to license use of its
5 images for mobile apps. (SUF 46.) None are cited in the list of documents reviewed in
6 Exhibit B to his report and the language of these agreements is nowhere mentioned in his
7 report. Instead he simply surmised (p. 24) that in those instances the licensee specifically
8 requests the right to make use on a mobile app. Despite these many omissions, including
9 the failure even to mention any guiding principles of contract interpretation, and despite
10 the fact that Mr. Sedlik is not even a lawyer, he asserts without reservation that KAYAK
11 “cannot reasonably claim that the definition of ‘portal’ was vague, ambiguous, or subject
12 to interpretation.” (p. 16.) Indeed, as shown below, Mr. Sedlik insists that he knows
13 better than KAYAK itself what KAYAK understood was the scope of the license when it
14 entered the Agreement (and, as noted, also believes he knows even better than Evox what
15 Evox meant by the term “portal”).

16 The only actual industry “contracts” Mr. Sedlik cites in his report (pp. 25-27) do
17 not use the term “portal” or “portal website.” Instead, they are simply internet pages with
18 drop-down menus in which licensees can pick from options for use, including use as
19 website or for mobile apps or both (among other possible uses). Certainly Evox never
20 presented KAYAK with a similar range of choices before the parties signed their
21 Agreement. Hence, Mr. Sedlik’s own examples, divorced from the actual circumstances
22 of KAYAK’s actual travel services business and the actual Agreement here at issue,
23 disprove his own suggestion that the term “portal” should have somehow clearly signaled
24 to KAYAK it would not be permitted to use the subject images on its mobile app.

25 Mr. Sedlik purports to have reviewed various documents (Ex. B to Report),
26 including KAYAK’s Counterclaim, the deposition of Lauren Fulton, who negotiated the
27 contract with Evox on behalf of KAYAK, and the Report of Gary Elsner, KAYAK’s
28 stock photography expert, which set forth KAYAK constant and unshaken understanding

1 that the Agreement permitted use of the subject stock photos on its mobile app; that
2 KAYAK never would have entered any Agreement that would have required it to disable
3 or partly disable a key part of its business (*i.e.*, the mobile app) when essentially the same
4 generic photographs were available from other stock photo companies; that KAYAK in
5 fact paid for all such uses on its mobile app because that was what it understood the
6 contract contemplated, and that the tiny cost of the contract (even including payment for
7 all uses on the mobile app) could not possibly justify trying to save a few dollars by
8 evading any known limitations of the Agreement on its highly popular and very public
9 mobile app. Despite his knowledge of KAYAK's statement of its own understanding and
10 KAYAK's explanation why it held (and still holds) its understanding of the meaning of
11 the Agreement, Mr. Sedlik's report conspicuously never even mentions much less seeks
12 to address these known facts or reconcile his conclusions with the reality of what
13 KAYAK has said and what it did (in actually paying for all of the disputed uses). He
14 does not have to agree with KAYAK's position, but if he does not even acknowledge it,
15 his contrary conclusions are meaningless.

16 So absurd is Mr. Sedlik's position that, at his deposition, he refused even to
17 concede that, at the very least, KAYAK (even if only subjectively) knows better than
18 does he what KAYAK itself understood, what KAYAK itself intended and what
19 KAYAK itself actually did in paying for its very public use of the subject photos. (Sedlik
20 Tr. 150:14-162:25.) In trying to explain why he never addressed in his report why
21 KAYAK would ever have entered such a tiny contract for photos it could have gotten
22 elsewhere without disabling or partly disabling its mobile app, Mr. Sedlik later denied
23 that that was the meaning of his testimony but he never admitted that KAYAK itself
24 clearly knows better than he does what it intended and continued to refuse to entertain
25 even the possibility that the parties simply misunderstood one another; instead, he
26 suggested either that KAYAK was trying to defraud Evox or that its employee who
27 negotiated the deal was incompetent. (Tr. 170:14-189:19.) The fact that he failed even to
28 attempt to address these issues, and his refusal to admit the obvious that KAYAK of

1 course knows better than he does what it subjectively understood, deprive Mr. Sedlik's
2 report of any tissue of credibility. Stated in an admittedly extreme manner (as noted
3 during Mr. Sedlik's deposition), the only way Mr. Sedlik's testimony could be allowed
4 under FRE 702 were if he could claim expertise in mind-reading. Mr. Sedlik's
5 nonsensical insistence that he knows better than even KAYAK what it subjectively
6 understood, and his insistence on some a priori interpretation of the contract divorced
7 from any known rules of contract construction, makes his views inadmissible under
8 *Daubert*.

9 Further demonstrating his bias, Mr. Sedlik states in his discussion of the factual
10 background (p. 9) that "Kayak informed Evox that is was only interested in using the
11 Licensed Photographs on KAYAK.com." In fact, there is no record of any such
12 communication in this case, and there is no citation to any such record in Mr. Sedlik's
13 report.⁵ His bias is also made manifest by statements such as the following false and
14 argumentative assertion in the factual background of his report: "Kayak cannot
15 reasonably claim that after engaging in an intensive negotiations process, reviewing and
16 revising agreement terms, It did not understand terms such as 'website' and 'URL' as
17 used within the Agreement ..." Not only is it not for Mr. Sedlik to opine on what
18 KAYAK can reasonably claim, but it is pure fiction to say that there were intensive
19 negotiations for an contract that cost an entire \$11,000 for an entire year, and there is not
20 even a dispute in the case what terms such as "website" and "URL" mean. His bias is
21 also shown by his refusal to answer even the simplest questions at his deposition, such as
22 whether he had any factual basis to challenge KAYAK's *contention* in this case that it
23 paid for all uses of the photos on its mobile app as well as its website. (Tr. 49-62.)

24
25
26 ⁵The closest thing to such a statement is a question posed by Evox in perhaps the
27 very first message it sent to KAYAK inquiring if KAYAK wished to use the images on
28 its website. But KAYAK never answered the question directly and certainly never said
affirmatively that it was only interested in using the images on its website. (SUF 19.)
Mr. Sedlik's statement is simply false. Mr. Sedlik need not agree with KAYAK's
understanding, but to testify at all, much less as an expert, he must be able to articulate
why. His bare *ipse dixit* conclusions are meaningless.

1 Mr. Sedlik's report is simply baseless argument by a non-attorney unqualified to
2 construe a contract and can only confuse the jury.

3 **i. Mr. Sedlik's Report Is Not Proper Rebuttal**

4 Although offered as a rebuttal to the report of KAYAK's stock photography
5 expert, Gary Elsner, who did not attempt to construe the meaning of the Agreement but
6 instead only explained that the term "portal" or "portal website" is not a standard term
7 used in licensing and explained the nature of the subscription pricing model set forth in
8 the Agreement, Mr. Sedlik does not actually respond to or directly address what
9 Mr. Elsner states.

10 As noted, consistent with Mr. Elsner's report, Mr. Sedlik does not identify a single
11 other stock photo license that uses the term "portal" or "portal website." Moreover,
12 Mr. Sedlik likewise does not directly dispute the opinion of KAYAK's expert that the
13 licensing model used in the Evox/KAYAK Agreement was a subscription pricing model
14 in which KAYAK had essentially limitless use of all the images for an essentially fixed
15 price,⁶ thus treating the photos essentially as commodities. Mr. Sedlik does not address
16 the subscription pricing model at all or express any direct disagreement with Mr. Elsner,
17 but instead references yet another pricing model (pp. 12-13.), namely, a "rights managed"
18 model, which he says is the proper way to categorize the Agreement. However, in
19 discussing the "rights managed" model, he never disagrees with Mr. Elsner's conclusion
20 that the Agreement here is best viewed as a subscription model. He merely mentions the
21 "subscription" model but does not explain why he thinks it is or is not applicable or
22 whether he disagrees with Mr. Elsner. Moreover and more important, semantics aside,
23 because the jury here will not be asked to decide what label to apply to the Agreement,
24 what matters is that Mr. Sedlik *never even addresses* the only *substantive* conclusion
25 from Mr. Elsner's report: namely, that the Agreement licensed an entire catalog of
26 images for a modest monthly fee that is, in effect, a form of commodity pricing. (SUF
27

28 ⁶In the Agreement, the specific pricing was \$950/month for the first two million
unique visits and \$250 for each additional million visits.

40, 162.) The only reason this is relevant is that given the commodity pricing, there was no reason for Evox to object to KAYAK's use of the images on its mobile app, because that simply would have generated more revenue (which it of course received anyway because that is the deal KAYAK thought it was entering). Indeed, Evox's own witness who negotiated the Agreement concedes he would have been happy to include the mobile app had he realized that was what KAYAK intended all along. (SUF 17.) Nonetheless, at his deposition, Mr. Sedlik refused even to acknowledge the possibility that KAYAK understood it was licensing the right to use the images for its actual business, not just a part of the business.

Mr. Sedlik further devotes two pages of his report (p. 22-23) to arguing that a mobile app is distinguishable from a website. However, this is not rebuttal, as neither KAYAK nor its expert, Mr. Elsner, ever argued that the two are the same. Moreover, Evox already designated a separate claimed expert, Brad Ulrich, to testify on this issue (or non-issue) as part of its affirmative case (not in rebuttal).

Allowing Mr. Sedlik to testify on contract issues can only serve to confuse the jury. For the same reason, his report should be inadmissible in opposing KAYAK's pending motion for summary judgment.

C. Mr. Sedlik's Analysis of Copyrightability Is Irrelevant

Mr. Sedlik is not a lawyer and identifies in his report no expertise to allow him to testify as an expert on this subject of copyright law. His report also is not proper rebuttal to Mr. Elsner's report, in which Mr. Elsner simply (i) reviewed the five photographs identified by Evox as containing some original expression in response to two Court orders (ECF No. 32 and 43) directing it to identify all of the allegedly copyrightable elements in its works in response to KAYAK's Interrogatory 2; (ii) reviewed some of the thousands of similar photographs available from other sources; (iii) reviewed the deposition testimony of Evox's witnesses on what if anything was original in the subject photographs, and (iv) concluded he could identify nothing original that distinguished the Evox photographs from the multitude that preceded them. Indeed, Mr. Sedlik nowhere

1 mentions the five photographs or indeed any of the Evox photographs in issue; never
2 considers any of the prior art; never considers the admissions by Evox's witnesses that
3 Evox did not originate the features it now says are original, and never identifies anything
4 original and non-functional (*i.e.*, copyrightable) in any of the subject photographs.

5 It is well-settled (and Mr. Sedlik does not question) that copyright does not protect
6 processes; only the actual expression in individual works might be (assuming it is
7 original and non-functional). *See* 17 U.S.C. § 102(b) (“[i]n no case does copyright
8 protection for an original work of authorship extend to any idea, procedure, process,
9 system, method of operation, ... regardless of the form in which it is described,
10 explained, illustrated, or embodied in such work.” *Bikram’s Yoga Coll. of India, LP v.*
11 *Evolution Yoga, LLC*, 803 F.3d 1032, 1043 (9th Cir. 2015). *Peters v. West*, 692 F.3d 629
12 (7th Cir. 2012), explained, in language directly relevant to photographic processes such
13 as those at issue here:

14 Copyright protects actual expression, not methods of expression. 17 U.S.C.
15 § 102(b); *Baker v. Selden*, 101 U.S. 99, 104 (1879). Just as a photographer
16 cannot claim copyright in the use of a particular aperture and exposure
17 setting on a given lens, no poet can claim copyright protection in the form of
18 a sonnet or a limerick. Similarly, [plaintiff] cannot claim copyright over a
19 tercet. *See Steele v. Turner Broad. Sys. Inc.*, 646 F. Supp. 2d 185, 192 (D.
20 Mass. 2009) (“A common rhyme scheme or structure does not qualify as
21 original expression protectable under federal copyright law.”).
22 *Id.* at 636. *Accord, Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258,
23 1268 (10th Cir. 2008), *cert denied*, 555 U.S. 1138 (2009).

24 Mr. Sedlik’s report begins (p. 28) by noting correctly that Evox need not employ
25 novel techniques for its photographs to be copyrightable, but rather that (whatever its
26 techniques) “[i]t is the resulting expression, not the technique used to achieve that
27 expression, that determines eligibility for copyright protection.” However, once correctly
28 establishing this one element of the test of copyrightability, he never provides any

1 analysis of the expression in any of the photographs at issue and never responds to
2 anything Mr. Elsner observed about his (Mr. Elsner's) inability to identify in the Evox
3 photographs any original or nonfunctional expression.

4 Not only does Mr. Sedlik's report identify no creative expression in any of the
5 actual Evox photographs at issue in this case, he nowhere identifies in his report any of
6 the specific Evox photos (if any) that he purports even to have reviewed and he nowhere
7 mentions any expression in any such photographs that might support a finding of
8 copyrightability. Likewise, he does not even attempt to weigh whether those elements
9 are original or nonfunctional. Nor does he address any of the thousands of third-party
10 photographs that are virtually indistinguishable from the subject Evox photos. He does
11 not address Evox's answer to KAYAK's Interrogatory No. 2, in which Evox listed all of
12 the allegedly copyrightable elements of its photographs or attempt to reconcile his
13 testimony with that interrogatory answer. Nor does he mention any of the deposition
14 testimony of Evox's witnesses admitting that most or all of these elements were either
15 adapted from prior third-party photographs of cars, are functional or are not features for
16 which Evox has retained any records to prove how they were done or why.

17 The most obvious reason for the complete irrelevance of Mr. Sedlik's discussion of
18 copyrightability is that his entire analysis (Sections J – X p. 28-40) was copied verbatim
19 from a report he prepared for Evox in a prior case that did not involve any of the
20 photographs at issue here, namely *Evox Productions LLC v. California Rent-A-Car*.
21 (Moskin Dec. Exs. 2, 3.) Mr. Sedlik admitted at his deposition he did not even remember
22 what photographs were at issue in the *California Rent-A-Car* litigation. (Tr. 33:24-
23 34:15.) When confronted by the fact that his "analysis" was simply copied from a case
24 involving entirely different photographs, the most Mr. Sedlik could say was that Evox's
25 techniques were the same. (Tr. 237:15-238:14.) Laying aside that that is not true
26 because the *California Rent-A-Car* photographs did not involve the same "spin" process
27 (and Mr. Sedlik certainly never attempted to show they did), as Mr. Sedlik admits, as a
28 matter of law, "techniques" and "processes" are not copyrightable, only expression.

1 Demonstrating his lack of candor, Mr. Sedlik (before being confronted with the
2 fact that his report was simply copied from another case), testified under oath that where
3 he used the term photograph with a capital “P” he (generally) meant to refer to the
4 photographs actually at issue. (Sedlik Tr. 216:23-217:5.) In fact, excluding his
5 introduction (§I) the word “Photograph(s)” is capitalized only 5 places in the analysis
6 sections the report, Sections J – X (p. 31 §K; p. 32 §L; p. 40 §V, 43 §X.⁷) However, the
7 falsity of this testimony is shown by the fact that he used the same capitalization pattern
8 in the report he prepared for Evox’s litigation against California Rent-A-Car (Moskin
9 Decl. Ex. 2: p. 5 ¶ 6; p. 6 ¶ 18; p. 6 ¶1 9; p. 15 ¶ 44 and p. 16 ¶45), involving entirely
10 different photos. The only partially new section he added was his legal analysis of the
11 *Meshwerks* decision (§W.) And even in discussing *Meshwerks*, his statement (p. 42) “nor
12 do the Photographs evince intent by Evox to exactly replicate any automotive designs”
13 appears verbatim in paragraph 48 of his California Rent-A-Car report (including the
14 capitalized “P”). However, that language directly addresses a defense raised only by
15 California Rent-A-Car, not KAYAK.⁸

16 His conclusions (such as that “the Photographs are successful automotive
17 photographs” (p. 31) or “of the highest professional caliber” (p. 43) are also not relevant
18 to copyrightability and would be confusing to a jury. The jury in this case will not be
19 asked to decide if the photographs were “successful” or of “high caliber” but whether
20 they are copyrightable. His windy generalizations about the possible creative choices
21 made by Evox are irrelevant because they do not correspond with any of the very specific
22 alleged creative choices identified by Evox in its response to KAYAK’s Interrogatory 2.

23
24 ⁷On p. 38 § P, he does add one new sentence that there are no props in the
25 “Photographs” at issue in this case. That one sentence does not appear in his California
Rent-A-Car opinion.

26 ⁸California Rent-A-Car argued that the Evox images there at issue were not
27 copyrightable because the cars themselves were somehow subject to copyright protection
28 (a legal position KAYAK rejects) and that Evox photos were only derivative works
copied from the cars. Although KAYAK does contend that the Evox photographs at
issue in this case were derived from other *photographs* of cars, and show no original
variation from such *photographs*, cars themselves are functional and not copyrightable.
(Moskin Decl. ¶ 5.)

1 Likewise, he argues a purely legal point (p. 42) whether a specific case mentioned
2 in Mr. Elsner's report is "relevant." Mr. Elsner did not "argue" whether the case,
3 *Meshwerks, Inc. v. Toyota Motor Sales U.S.A.*, 528 F.3d 1258 (10th Cir. 2008), was
4 relevant, he simply noted that it was one of the precedents provided to him by counsel
5 identifying standards of copyrightability to assist Mr. Elsner in evaluating whether he
6 could find in the five photographs identified by Evox as containing original and non-
7 functional expression were indeed original based on these standards and his knowledge of
8 the industry. Moreover, because Mr. Sedlik is not a lawyer, his views about the
9 relevance or not of specific cases are not admissible expert testimony. Equally irrelevant
10 and inappropriate are his criticisms of Mr. Elsner (p. 30) for merely acknowledging the
11 standard accepted by the 9th Circuit in applying the scenes a faire doctrine under which
12 features that are widely used or standard in a given field cannot be protected under
13 copyright for fear of conferring a monopoly on the claimed owner. *Satava v. Lowry*, 323
14 F.3d 805, 812 (9th Cir. 2003) ("These elements are so commonplace in glass-in-glass
15 sculpture and so typical of jellyfish physiology that to recognize copyright protection in
16 their combination effectively would give Satava a monopoly on lifelike glass-in-glass
17 sculptures of single jellyfish with vertical tentacles.") It is Mr. Sedlik who is mistaken on
18 the law, whereas Mr. Elsner made no pretense to offering legal opinions.

19 Finally, Mr. Sedlik's report did not analyze or consider any of the myriad prior art
20 photographs (SUF 67-68) that show (by Evox's own admission (SUF 158)), that the
21 elements it identified in response to KAYAK's Interrogatory 2 are not original to Evox.

22 Allowing Mr. Sedlik to testify can only serve to confuse the jury. Nor is his report
23 on copyrightability admissible in opposing summary judgment.

24 **i. Mr. Sedlik's Report Is Not Proper Rebuttal**

25 Not only does Mr. Sedlik's report in no way aid in understanding the issues of
26 copyrightability, but his opinions are not proper rebuttal to the Elsner report. Mr. Elsner
27 did not opine on copyrightability as such; he admits he is not a lawyer and that he simply
28 accepted the summary of copyright principles provided by KAYAK's counsel. Instead,

1 with those principles in mind he simply applied his knowledge of photography (and stock
2 photography in particular) to assess whether he could identify anything original and non-
3 functional in the specific photographs and the underlying photographic processes
4 identified by Evox. In so doing, he merely observed that certain such processes were not
5 unique to Evox; that many of the tools used by Evox were standard in the industry, and
6 that, given the widespread use of certain features employed in the Evox photographs in
7 issue, he could not identify anything original and non-functional. He also opines on the
8 possible detrimental effects on the industry in allowing Evox to monopolize rights in its
9 images.

10 In response, Mr. Sedlik does not identify any respect in which Mr. Elsner
11 incorrectly assessed the specific Evox photographs and he does not even purport to have
12 reviewed any of the thousands of nearly identical photographs available from other stock
13 photo houses (and which predated Evox). Hence, the Sedlik report is not proper rebuttal.

14 **III. CONCLUSION**

15 For the foregoing reasons, KAYAK respectfully requests that the Court grant the
16 summary judgment dismissing the Complaint, as set forth in the accompanying Proposed
17 Order.

18
19 DATED: December 16, 2016

FOLEY & LARDNER LLP

20
21 By: /s/ Jonathan E. Moskin

22 Jonathan E. Moskin

23 Jean-Paul Ciardullo

24 Attorneys for Defendant/Counterclaimant
25 KAYAK, INC.
26
27
28

PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to this action; my current business address is 555 South Flower Street, Suite 3500, Los Angeles, CA 90071-2411.

On January 30, 2013, I served the foregoing document(s) described as: **KAYAK SOFTWARE CORPORATION'S NOTICE OF MOTION AND MOTION TO EXCLUDE TESTIMONY OF JEFFREY SEDLIK** on the interested parties in this action as follows:

[]

BY MAIL

I placed the envelope(s) with postage thereon fully prepaid in the United States mail, at Los Angeles, California.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service; the firm deposits the collected correspondence with the United States Postal Service that same day, in the ordinary course of business, with postage thereon fully prepaid, at Los Angeles, California. I placed the envelope(s) for collection and mailing on the above date following ordinary business practices.

BY E-MAIL

I served the foregoing document via e-mail to the addressees above at the e-mail addresses listed therein.

BY FACSIMILE

I transmitted the document(s) by facsimile transmission from a facsimile transmission machine, at Los Angeles, California, with the telephone number, 213.486.0065, to Click and Type Name whose facsimile transmission telephone number is Click and Type Number .

I am readily familiar with the firm's practice for delivery by facsimile transmission: the firm transmits the document(s) from a facsimile transmission machine to the person to be served. I placed the document(s) in the place designated by the firm, at Los Angeles, California, for facsimile transmission to Click and Type Name whose facsimile transmission telephone number is Click and Type Number on the above date following ordinary business practices. The document(s) was transmitted from a facsimile transmission machine with the telephone number of 213.486.0065.

The facsimile transmission was reported as complete without error by a transmission report, issued by the facsimile transmission machine upon which the transmission was made, immediately following the transmission.

BY HAND DELIVERY. I delivered the envelope(s) by hand to addressee(s).

1 BY EXPRESS MAIL (Via United States Postal Service)

2 I deposited the envelope(s) in a facility regularly maintained by the
3 United States Postal Service for receipt of Express Mail, with
Express postage fully prepaid.

4 I am readily familiar with the firm's practice for collection and
5 processing of correspondence for Express Mail; the firm deposits the
6 collected correspondence with a facility regularly maintained by the
7 United States Postal Service for receipt of Express Mail that same
8 day, in the ordinary course of business, with Express Mail postage
thereon fully prepaid, at Los Angeles, California. I placed the
envelope(s) for collection and Express Mailing on the above date
following ordinary business practices.

9 BY EXPRESS SERVICE CARRIER (Via Overnight Courier Service)

10 I placed the envelope(s) in a box or other facility regularly
11 maintained by Click and Type Name of Courier, or delivered the
12 document(s) to a courier or driver authorized by the express service
carrier to receive document(s), in an envelope(s) or package
designated by the express service carrier, with delivery fees paid or
provided for, at Los Angeles, California.

13 I am readily familiar with the firm's practice for collection and
14 processing of correspondence for delivery by
Click and Type Name of Courier : collected packages are picked up
15 by an express carrier representative on the same day, with the Airbill
16 listing the account number for billing to sender, at Los Angeles,
California, in the ordinary course of business. I placed the
17 envelope(s) in an envelope or package designated by the express
service carrier for collection and processing for express service
delivery on the above date following ordinary business practices.

18 Executed on January 30, 2013, at Los Angeles, California.

19 I declare under penalty of perjury under the laws of the State of
20 California that the above is true and correct.

21 I declare that I am employed in the office of a member of the bar of
this court at whose direction the service was made.

22
23 Click and Type Name
24
25
26
27
28